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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 28 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Amendment of Section 73 622(b))
Table of Allotments,)
Digital Television Broadcast Stations.)
(Tyler, Texas))

MM Docket No.01-244
RM-10234

In the Matter of:)
)
Amendment of Section 73 622(b))
Table of Allotments,)
Digital Television Broadcast Stations.)
(Lufkin, Texas))

MM Docket No. 01-245
RM-10235

To. The Commission

OPPOSITION OF CIVCO, INC. TO APPLICATION FOR REVIEW

CivCo, Inc ("CivCo"), permittee of stations KLTV-DT (Tyler, Texas) and KTRE-DT (Lufkin, Texas), by its attorneys and pursuant to Section 1.115 of the Commission's Rules,¹ hereby submits its opposition to the Application for Review ("Application") filed by International Broadcasting Network ("IBN"), a low power television licensee, with regard to the above-captioned *Memorandum Opinion and Order* ("MO&O") released on September 12, 2003. By the MO&O, the Media Bureau ("Bureau") denied IBN's Petition for Reconsideration and reaffirmed its decision to grant substitution of the assigned DTV allotments for KLTV-DT and

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¹ 47 C.F.R. § 1.115 (2002) Pursuant to §§ 1.115 and 1.4 of the Commission's rules, this opposition is timely filed.

KTRE-DT, as requested by CivCo.² IBN has opposed these allotment changes because construction and operation of modified facilities for KTRE-DT and KTLV-DT on the substituted channels will displace IBN's low power stations KIBN-LP (Lufkin, Texas) and KLGW-LP (Longview, Texas) (collectively, the "IBN LPTV Stations").

IBN does not submit any arguments or facts in its Application that would justify a different outcome in this proceeding. First, IBN argues that the Bureau's decision to grant the channel substitutions of CivCo's full-power stations despite the resulting displacement of IBN's LPTV Stations is contrary to Commission precedent and policy. In fact, the Bureau's decision not only was consistent with Commission precedent and policy, it was compelled by it. Throughout this proceeding, IBN stubbornly has refused to accept the Commission's well-established and consistently applied rules that lower power television stations are secondary services and must give way to full power stations, which are the primary services in the band. IBN thus unreasonably contended in its Application that its stations' low power status is "irrelevant."³ There is little need to argue this point. In the Bureau's words, "It is so well-established that low power stations are secondary to full power stations that we see no reason to

² Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Tyler, Texas) and (Lufkin, Texas), *Report and Order*, MM Docket Nos. 01-244 and 01-245, RM-10234 and 10235 (rel. October 9, 2002). In the *Report and Order*, the Commission adopted Civic's request for the substitution of DTV channel 10 for station KLTW(TV)'s assigned DTV channel 38 at Tyler, Texas and of DTV channel 11 for station KTRE (TV)'s assigned DTV channel 43 at Lufkin, Texas

³ IBN Application at 5.

discuss IBN's contentions further."⁴ Pleadings relying on such contentions border on being frivolous and obstructive.⁵

IBN argues that CivCo somehow failed to meet its burden in demonstrating that the proposed reallocations were in the public interest. As this contention demonstrates, IBN continues to misconstrue Commission policy badly. Proposed channel changes that meet the Commission's technical requirements regarding city-grade service and interference protection and further the Commission's public interest goals with respect to implementing digital television serve the public interest and the Commission routinely approves them.⁶ The Commission has granted numerous DTV channel changes, and low power television services displaced by these reallocations must give way as secondary.⁷ IBN cites no instance of a DTV channel change being denied on the ground that a low power television station might be displaced, nor can it. For the Commission to treat the potential displacement of a secondary service as grounds to prohibit changes to a primary station would contravene the Commission's own rules designating LPTV services as secondary. IBN refuses to acknowledge the obligations

⁴ Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Tyler, Texas) and (Lufkin, Texas), *Memorandum Opinion and Order*, MM Docket Nos. 01-244 and 01-245, RM-10234 and 10235, ¶ 9 (rel. September 12, 2003).

⁵ See, e.g., Assignment of Construction Permit of Station WRTM-FM (Port Gibson, Mississippi), *Memorandum Opinion and Order*, FCC 03-245, ¶¶ 2, 3 (rel. Oct. 23, 2003).

⁶ See Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Kingston, New York), *Memorandum Opinion and Order*, MM Docket No. 00-121, RM-9674, ¶ 2 (rel. Sept. 5, 2003). IBN's assertion that there is no evidence to support that the channel substitutions would serve the public interest is thus without merit.

⁷ See Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Fort Myers, Florida), *Report and Order*, MM Docket No. 00-180, RM-9956, ¶ 1 (rel. Nov. 20, 2002), citing *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, 6370-71 (2000).

of secondary stations despite having applied for and accepted licenses to operate low power stations.

Second, IBN claims that the Bureau made erroneous findings of material questions of fact, but never states with any particularity what those erroneous findings were.

Third, IBN seeks review based on prejudicial procedural error, restating its claim that CivCo intentionally deprived IBN of timely notice of its reallocation proposals. This claim is meritless. IBN had engaged in negotiations with CivCo concerning the reallocation well before release of the NPRM and had knowledge of many of the proposals' details. Furthermore, IBN was furnished with copies of relevant documents, including the petitions for rulemaking, well in advance of the date for the submission of any comments in these proceedings. IBN participated in that stage of the proceedings and has filed other pleadings as well. Having extensively participated in these proceedings, IBN cannot argue that it has been prejudiced in any fashion, and, indeed, IBN has not been prejudiced.⁸

Fourth, IBN again raises two constitutional points in an attempt to thwart the granted DTV channel changes, but neither can be supported. IBN's argument that the displacement of its low power stations amounts to a taking prohibited by the Fifth Amendment is without merit.⁹ Section 301 of the Communications Act provides that no license granted pursuant to the act "shall be construed to create any right beyond the terms, conditions, and periods of the

⁸ Where compliance with Section 1401(d) actually is required, the Commission will look to whether a party is prejudiced (Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Farmington, Grass Valley, Jackson, Linden, Placerville and Fair Oaks, California, Carson City and Sun Valley, Nevada), *First Report and Order*, 10 FCC Rcd. 9938, n 2 (MM Bur 1995))

⁹ IBN Application at 4.

license”¹⁰ The courts have long held that licensees have no property interest in their licenses beyond the terms of the licenses themselves.¹¹ IBN holds licenses for low power, non-Class A stations, and it has no rights in the spectrum beyond the terms of its license and the Commission rules governing its service. IBN’s claim that the Commission’s classification of television stations violates the Equal Protection clause is likewise misguided.¹² The Commission has an obvious and rational basis for classifying low-power stations as secondary to full-service stations – to avoid interference and manage spectrum efficiently.

Fifth, IBN suggested in its petition for reconsideration and outrageously reasserts in its Application that the Commission’s *Report and Order* in this proceeding was somehow biased.¹³ The Commission’s own rules and policies compelled the decision in this proceeding, and the decision itself thus stands as the strongest evidence that the agency did not exercise any bias or act improperly. The legal principles applied in the *Report and Order* are so well-established as to leave no room for “bias” to have any part. IBN provides no evidence whatsoever to support its offensive accusations.

Finally, IBN attempts to blame CivCo for IBN’s apparent failure to seek Class A status for its own stations, claiming that it could not meet the statutory non-interference requirement because of CivCo’s proposed channel changes.¹⁴ This does not make sense. By the statute’s

¹⁰ 47 U.S.C. § 301

¹¹ See, e.g., *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

¹² IBN Application at 4.

¹³ IBN Petition for Reconsideration at 2; IBN Application at 5.

¹⁴ IBN Application at 5.

plain language, CivCo's requested channel changes were never an impediment to IBN's seeking Class A licenses.¹⁵ In fact, the Commission's rules explicitly allowed LPTV stations to file Class A applications and subsequently seek displacement relief.¹⁶ IBN chose instead to spend its time, energy, and dollars seeking to thwart an outcome obviously compelled by the Commission's rules and policies. Indeed, as far as is known, the displacement channels that CivCo identified for the IBN LPTV Stations still remain available today for preservation of IBN programming. IBN was not precluded – and is still not precluded – from seeking available displacement relief. Furthermore, IBN raised this argument for the first time in its reply to CivCo's opposition to its petition for reconsideration, in contravention of the Commission's rules.¹⁷ The Commission, therefore, should disregard this argument on procedural grounds as well.

CONCLUSION

Although the implementation of digital television has displaced many low power stations, IBN continues to seek unique and extraordinary relief from the displacement of its secondary stations. Undoubtedly, IBN's efforts would be much better spent in filing and prosecuting the displacement applications that CivCo has provided to it. The Bureau's decision to grant the DTV channel changes was compelled by the agency's rules and wholly consistent with them. IBN raises no issue in its Application for Review that warrants reconsideration of the Bureau's

¹⁵ 47 U.S.C. § 336 (f)(7)(A)(ii). None of the four criteria set forth in this section relating to a Class A applicant's obligation not to interfere with digital television service would have applied to channel changes that at the time had been proposed but had not been granted.

¹⁶ *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, ¶ 114 (2000).

¹⁷ 47 C.F.R. § 1.45(c) (2002).

decision. Accordingly, the Commission should reaffirm the Bureau's decision to grant CivCo's requested channel changes and deny IBN's Application.

Respectfully submitted,

CIVCO, INC.

By, 

John S. Logan

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Its Attorneys

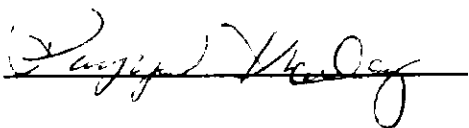
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October 28, 2003

CERTIFICATE OF SERVICE

I, Rayya Khalaf, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 28th day of October 2003, the foregoing "OPPOSITION OF CIVCO, INC. TO APPLICATION FOR REVIEW" was served via first class mail to the following.

Paul J. Broyles
President
International Broadcasting Network
P.O. Box 691111
Houston, TX 77269

A handwritten signature in cursive script, appearing to read "Paul J. Broyles", is written over a horizontal line.